No. 1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WALTER R. HEARNE and STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR IDAHO, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the three judge district court dismissing the complaint and supplemental complaint after trial on the merits is reported at 225 F. Supp. 645 (D. Idaho S.D., 1964).

Jurisdiction

On January 10, 1964, the three-judge statutory court entered an order and judgment dismissing the complaint and supplemental complaint which had sought to enjoin various state officials from performing functions in connection with state constitutional and statutory provisions alleged to be in violation of the Fourteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the district court on February 10, 1964, and time for docketing the appeal with the clerk of this Court was extended by order of the district court to May 6, 1964. Jurisdiction of this Court to review on direct appeal the decision of the district court dismissing the complaint and supplemental complaint is conferred by 28 U.S.C 1253.

United States Constitution, Federal Statutes, and State Constitution and Statutes Involved

The pertinent provisions of the United States Constitution; 42 U.S.C. Sections 1983 and 1988; 28 U.S.C., Sections 1343(3), 2201 and 2202; the Constitution of

Idaho, Art. III, Sections 1, 2, 4 and 5, Art. XX, Sections 1, 3 and 4; 1911 House Joint Resolution 13; and Idaho State Law, Sections 34-1801, 67-202 and 67-203, as amended since 1917, are set forth in Appendix B, *infra*, pp. 1b-11b.

Question Presented

The legislative apportionment of Idaho State is determined by a formula contained in the state constitution and implemented by statutes. Application of that formula results, and must necessarily result, in gross and arbitrary disproportions between population and representation in both houses of the legislature and systematically discriminates against residents of the more heavily populated areas of the State.

Appellants sought to prove that the apportionment formula was adopted with a deliberate purpose and intent to limit the representation of residents of the more heavily populated areas of the state and that the resulting discrimination was therefore particularly invidious. Further, appellants offered to prove that as a result of the aforesaid malapportionment, appellants and others similarly situated are victims of economic discrimination and are deprived of due process of law. Both offers were rejected. After trial the district court acknowledged the existence of jurisdiction and a justiciable issue, but dismissed the action. The respondents offered no evidence to justify the apportionment. The questions presented are:

1. Whether the district court erred in dismissing the complaint and supplemental complaint on the grounds that it could refuse to make a decision on the merits in exercising its discretion under the Declaratory Judgment Act because of its professed lack of ability to comprehend and appraise the geographic, demographic, economic, social and political forces alleged to be involved in any plan of legislative apportionment.

2. Whether the district court erred in dismissing the complaint and the supplemental complaint on the grounds that relief cannot be granted under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988, by reason of the lack of ascertainable judicial standards, the lack of precedents, the failure of plaintiffs to make prior application to the state courts for the same relief, and that any relief which might be granted would interfere with the guaranty of a republican form of government under the Constitution of the United States, Article 4, § 4.

3. Whether the district court erred in dismissing the complaint and supplemental complaint on the grounds that plaintiffs-appellents had failed to prove a claim for equitable relief for the reason that clear and imminent irreparable damage was not shown and an injunction cannot be enforced against a state legislature, and further, that an injunction prohibiting a future election of legislators should not be issued where the court is unable to define the standards of a proper apportionment system.

4. Whether the district court erred after trial on the merits by refusing to make findings of fact, conclusions of law, and a judgment on the validity of the 1911 Amendment to the Idaho constitution, and whether the apportionment scheme established thereby invidiously discriminates against the residents of the more populous counties in violation of the Fourteenth Amendment.

5. Whether the district court erred in dismissing the complaint and supplemental complaint on the grounds that plaintiffs had failed to prove that the apportionment invidiously discriminates against the residents of the more populous counties in violation of the Fourteenth Amendment.

6. Whether the district court erred in excluding all the evidence offered to prove:

(a) that the apportionment formulas for the house and senate have created invidious discrimination against the residents of the more populous counties in unfair distribution of state revenues, school aid, highway users funds; in unequal and unfair assessment and levy of taxes and distribution of public utility assessments to the various counties; in unequal motor vehicle regulations, resulting from affirmative legislative action in violation of the Fourteenth Amendment.

(b) that the present apportionment formulas were intended to discriminate against the residents of the more populous counties, being the device by which the

majority control of said legislature was continued and perpetuated by a minority of the residents of the state of Idaho, residing in the least populous counties, through their control of the majority in both houses of the legislature, by affirmative legislative action in violation of the Fourteenth Amendment:

(c) that the consensus of expert opinion supports the view that the malapportionment of the legislature, whereby both houses are controlled by minorities of the residents of the state, has resulted in the administration of the motor vehicle laws, minimum aid to the public schools, the establishment of public utility rates, and the assessment and distribution of assessment values on public utility property to the counties in a manner depriving the residents of the more populous counties of due process of law.

Statement

A) The Complaint and Supplemental Complaint

This action was brought by the complaint filed October 31, 1962, and the supplemental complaint filed April 12, 1963, in the District Court for Idaho, Southern Division, under the Civil Rights Act, U.S.C. Title 42, §§1983 and 1988, and under U.S.C. Title 28, § 1343. The appellants are citizens and voters residing respectively in the counties of Bannock and Ada. The suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and qualified voters similarly situated.

The appellees are: the Governor, the Secretary of State, the Attorney General, the Auditor, and the Treasurer of the State of Idaho; and the other appellees are the three county commissioners and the auditor each of Ada and Bannock counties. The complaints alleged that all of the appellees perform official functions arising out of the legislative apportionment of the state and the conduct of elections pursuant to such apportionment.

The complaints alleged that the appellants are denied due process and equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, by virtue of the provisions of the Idaho Constitution and the statutes in implementation thereof which provide for an apportionment of the State Senate and House of Representatives in a manner which is discriminatory to the residents of the more populous areas of the state.[1]

The complaint as supplemented contained three causes of action, the first of which alleged that the formula contained in the State constitution (Art. III, §§ 1, 2, 4 and 5) and statutes (Sections 67-202 and 203,) currently results in an apportionment which deprives appellants of rights guaranteed by the Fourteenth Amendment. The second cause of action alleged that those provisions of the state constitution and statutes, together with the 1911 amendment (H.J.R. 13, 1911

[1] The allegations of the complaint substantially parallel those of WMCA vs. Simon, 370 U.S. 190.

S.L.) and various prior apportionment statutes from 1917 to 1963, were invalid and violative of the Fourteenth Amendment at the time of their adoption and constituted over the period a continuing systematic device to perpetuate majority control of both legislative houses by a minority of residents of Idaho, which constituted "affirmative legislative action" depriving appellants of rights guaranteed by the Fourteenth Amendment. The third cause of action alleged that those provisions of the state constitution and statutes currently resulted in an apportioned legislature which has chronically and systematically enacted laws grossly discriminatory against the residents of the more populous areas in economic, taxation and regulatory matters which deprive said persons of property without due process of law.

As examples of the result of the apportionment formula, the admitted facts establish that 17% of the population elects a majority of the senate wth a range of one senator representing at the least 915 persons to at the greatest 93,460 persons. In the house a representative represents 915 persons at the least to at the greatest 14,394 persons, under a formula which allows one representative without full ratio up to 5,000 persons, and one additional representative for each full ratio of 10,000 persons thereafter.

The relief sought by the complaints was that the district court declare, pursuant to 28 U.S.C. 2201, that Article III, §§ 2, 4 and 5, of the Constitution of Idaho,

and Idaho Laws 67-202 and 67-203 are void and invalid under the Fourteenth Amendment of the Constitution of the United States; that the appellees be restrained from acting pursuant to said provisions, and that the court retain jurisdiction of the case until the state legislature provides for such apportionment of the state as would insure to appellants the rights guaranteed them by the Fourteenth Amendment.

B) The Prior Proceedings

The district court heard the cause on November 18 and 19, 1963, at which hearing it rejected as irrelevant appellants' offers to prove that: (a) the apportionment formula was specifically designed and intended to curtail the representation of residents of the more heavily populated areas of the state: and (b) that the malapportioned legislature in fact discriminated against such residents in levying taxes, allocating revenues, public utility regulation and exercise of police powers. Under these exclusionary rulings of the court, appellants were permitted only to introduce, and did introduce, evidence of the existing apportionment and the apportionment which must necessarily result when the mandatory formula contained in the state constitution and laws is applied to the 1960 citizen census figures.

Although the time to docket this appeal was extended 30 days, the reporter has not completed the transcript of the two-day trial at the date of printing (May 1) thus preventing Appellants from furnishing this Court pertinent quotations and references to the record.

The appellee county commissioners joined with appellants in asking the court for relief. No appellee called any witnesses, nor offered any evidence to justify or rationalize the gross disparities which exist in both senate and house between population and representation; some facts were stipulated or admitted.

C) The Opinion Below

The *per curiam* opinion of District Judges W. C. Mathes and Fred M. Taylor ordered the action dismissed, noting that

> ". . . as to the claim for declaratory relief, solely upon the ground that, in the proper exercise of the Court's discretion, relief . . . should be denied, without considering the merits . . .; and, . . . as to the claim for injunctive relief, upon the ground of 'want of equity'—that is failure to allege or prove a claim for which effective equitable relief can be granted." 255 F. Supp. at 656.

Circuit Judge Oliver M. Koelsch dissented, noting:

> "The Court declines to meet the basic issue in this case because of a professed lack of ability to comprehend and appraise the many and complex factors that may or do enter into the problem of the equitable representation of voters in the Legislature of the State of Idaho. Additionally the court does not entertain the petition because no method for correcting the asserted injustice is apparent.

> "Neither of these reasons, in my estimation, justifies a judicial disposition that does not come to grips with a problem touching such a fundamental right as that of legislative representation . . ."

The principal opinion did not examine the evidence in any particular, or discuss the merits of the case, although it conceded the existence of jurisdiction and a justiciable issue. Despite the opinion of the majority of this Court in *Baker* v. *Carr*, 369 U.S. 186, at 226, 82 S. Ct., 691, at 715, 7 L. Ed. 2d. 663, that judicial standards under the equal protection clause are well developed and familiar, the majority of the district court claims a ". . . lack of both omnicompetence and prescience, which it appears to us would be necessary, to make a judicial appraisal and declaration that the State's time-old method of apportionment is irrational . . ."

The Question Is Substantial

The question presented is substantial because the complaints dismissed below raise similar issues, and in many respects are identical to the complaint which this court held in *Baker* v. *Carr*, supra, presented: ". . . a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision." (At 369 U.S. 237, 7L. Ed.2d 697.) The dismissed complaints also raise similar issues in many respects

identical to those of the complaint in *WMCA, Inc. vs. Simon*, 370 U.S. 190, 8 L. Ed.2d 430, 82 S. Ct. 1234, in which this court vacated the dismissal judgment and remanded the case for the court below ". . . to consider the merits of the Federal constitutional claim, free from any doubts as to its justiciability and as to the merits of the alleged arbitrary and invidious geographical discrimination." The complaint in this action proceeds upon the same jurisdictional basis, has equivalent parties plaintiff and defendant, and, despite the trial below, is in essentially the same procedural posture as were the complaints before the court in the *Baker and WMCA, Inc.* cases. While the lower court granted a trial herein, it refused to make a decision, in holding that the complaints failed to state a claim upon which the court would exercise its discretion under the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201 and 2202, and in refusing injunctive relief on the grounds of failure to prove a claim for which effective equitable relief could be granted. The decision below is clearly contrary to the holding in the *Baker* case and the *WMCA, Inc.* case, and unless the lower court's holding is set aside, it will create considerable confusion as to the scope and import of the said cases.

The question presented is also substantial because of the similarity in the issues raised to appeals presently pending before this court, to-wit: *WMCA, Inc. vs. Simon*, No. 20, October Term, 1963, *Maryland Committee for Fair Representation vs. J. Miller Tawes*,

No. 29, October Term, 1963, and *Levin Nock Davis, vs. Harrison Mann*, No. 69, October Term, 1963.

The court below held that there was jurisdiction over the subject matter and a justiciable issue, but dismissed the complaints as being insufficient because, in the opinion of two members of the court, the myriad geographic, demographic, economic, social and political forces involved in apportionment of a legislature rendered the said majority unable to make a judicial appraisal and declaration concerning the existing apportionment formula, or to determine what a proper apportionment formula should be. The point need not be labored that this conclusion is contrary to the holding in *Baker*, where this court held that judicial standards under the equal protection clause are well developed and familiar, and the court should determine under the Fourteenth Amendment if the particular facts show a discrimination reflects no policy, but simply arbitrary and capricious actions.

This case poses for the first time the problem whether a lower court, based on a professional lack of ability to comprehend and appraise the many and complex factors in apportionment, and the alleged ineffectiveness of any equitable relief, can avoid a decision on the merits.

It is respectfully submitted that, from the standpoint of the Federal Constitution, it is irrelevant whether the discrimination alleged is primarily the result of the

designed legislative inaction contrary to the state constitution, as in *Baker*, or of affirmative action which takes the form of enactment of constitutional provisions and statutes implementing these provisions, as in this case. Cf. *Giles v. Harris*, 189 U.S. 475; *Pierce v. Society of Sisters*, 268 U.S. 510. See also, *Gibson vs. Board of Public Instruction*, 170 Fed. Supp. 454, 456, (S.D. Fla.) (1958). Clearly if the state acts in a manner which violates the rights guaranteed by the Fourteenth Amendment, it is no defense to assert that the state has violated such rights with the solemnity and majesty of a state constitutional provision. *Cooper v. Aaron*, 358 U.S. 1.

In this case the state constitution does not provide for constitutional conventions that can be called by the voters, nor does it provide for an initiative to amend the constitution. Idaho Constitution, Art. XX, §§1, 3 and 4. Nor does the fact that the state constitution was amended in 1911 by house joint resolution 13, amending Article III, §2, vitiate appellants' claims. Constitutional amendments must be originated by a two-thirds vote of the members of each of the two houses of the legislature, before being submitted to the voters, thus effectively perpetuating the minority control under the present apportionment formula.

In fact, and as alleged in the complaints, appellants have no adequate political remedy. In Idaho, as in New York and in Tennessee, the only possible source of relief must lie with the federal courts, for no solution to this

problem can be expected from voluntary action of the legislature which is, itself, a product of the malapportionment. That malapportionment is designed to allow a minority of the citizens to elect a majority of the state's legislature, and it is impossible for the majority of the citizens to acquire an equitable voice in the legislature, which is the only body that can initiate such constitutional amendments to the apportionment provisions. Only the legislature by a two-thirds vote can initiate a constitutional convention. Finally, compliance with the opinion of the majority judges below, requiring application to the state supreme court, is an inadequate remedy, such court having previously held that the Idaho constitution ". . . destroys any possibility of representation based solely on a per capita or per voter basis . . .", and that, ". . . disparity of representation stems from the constitution." *Caesar v. Williams*, 371 P. 2d, 421, at 248-249, 84 Idaho 254.

It would therefore be futile to refer appellants for redress to a political remedy since the very evil complained of in this action renders that political remedy ineffective. The Idaho constitution and laws restrict and nullify the very political process which ordinarily could be expected to bring about the repeal of such an undesirable apportionment formula, and must therefore be subject to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than other types of legislation. *United States v. Carolene Products Co.*, 304 U.S. 144, 82 L. Ed. 1234.

The malapportionment in Idaho deprives appellants of equitable political representation with regard to all matters in which the interests of the urban and rural residents conflict, so that there cannot be, in Idaho, "government by the consent of the governed"; but the malapportionment itself is, and is intended to be, self perpetuating unless judicial relief is available. It must, therefore, be subject to "exacting judicial scrutiny."

The holding below is contrary not only to the decisions in *Baker* and *WMCA, Inc.*, but is also inconsistent with, and seeks unduly to restrict the scope of *Gomillion v. Lightfoot*, 364 U.S. 339, *Wesberry vs. Sanders*, U.S. 11 L. Ed. 2d 481, and *Gray v. Sanders*, 372 U.S. 638. Recognizing that the identical provisions of the United States Constitution or its amendments are not involved in these cases, we nevertheless believe they stand for the proposition that a compelling case for judicial intervention is presented where the political ineffectiveness of a group results from the affirmative discriminatory acts of the state legislature. The malapportionment of Idaho is the result of just such an affirmative discriminatory action. That discrimination in the *Gomillion* case was against a class who were Negroes residing in particular sections of the city would make it ironic if appellants' rights to a vote fairly cast and equally counted, could be violated with impunity merely because they were not Negroes. That a vote by a resident of the county of Ada for a state senator is equal to 1/100 of a vote by a citizen of Clark

or Camas counties is to cast aspersions on the intellect and integrity of the residents of Ada county. Where, by the 1911 constitutional amendment and periodic revisions of the apportionment statutes, the legislature has maintained the minority control by the least populated counties of the state, counteracting the considerable population growth in a few counties of the state, this course of conduct clearly constitutes affirmative legislative action. Finally, it can hardly be contended after *Brown v. Board of Education*, 347 U.S. 483, that a violation of a constitutional right becomes sanctified merely because of the passage of time, during which time corrective efforts have been to no avail. Cf. *Fairbanks v. United States*, 181 U.S. 283. If the only defense to discrimination as flagrant and pernicious as that complained of in this action is that it is the result, as the court below noted, of ". . . the state's time-old method of apportionment . . .", the defense must be summarily rejected.

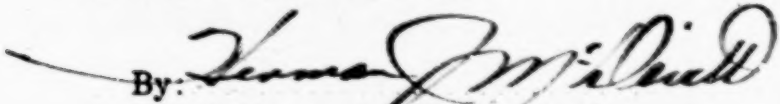
The court below dismissed the complaints, after trial, without questioning whether the malapportionment in fact exists in Idaho to the extent alleged in the complaint. In effect, the refusal of the majority below to exercise their discretion and to attempt to fashion effective, equitable relief, is a nullification of the constitutional rights which appellants seek to enforce by this action. It is to this court which appellants must now look as the sole possible source of redress for the deprivation of rights so fundamental to a democratic society.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal, or, in its discretion, without briefs and oral argument, should summarily reverse the decision below, and remand the case for decision on the merits.

Respectfully submitted,

McDEVITT & McDEVITT

By: 

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May 4, 1964

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO SOUTHERN DIVISION

Case No. 3815

WALTER R. HEARNE and
STANLEY E. WHITMAN,

Plaintiffs

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT, and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of Ada County, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL L. GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Defendants

OPINION

Before: KOELSCH, *Circuit Judge*, and
MATHES and TAYLOR (FRED M.),
District Judges.

PER CURIAM:

Plaintiff Hearne, a resident of Pocatello and a qualified voter in Bannock County, Idaho, and plaintiff Whitman, a resident of Boise and a qualified voter in Ada County, Idaho, commenced this action on November 1, 1962, seeking a declaratory judgment and equitable relief against the Governor, the Attorney General, and various other State and County officials of the State of Idaho. In keeping with the mandate of 28 U. S. C. § 2281, a three-judge court was convened. Thereafter, issues were joined and litigated. The case is now before us for decision following a trial upon the merits.

The declaratory relief which plaintiffs ask embraces a determination and declaration that certain of the provisions of the Idaho Constitution and statutes, providing for the apportionment and manner of election of State legislators, contravene the Fourteenth Amendment to the United States Constitution, by operating to deny to plaintiffs, and others similarly situated, due process of law and the equal protection of the laws. [See: Idaho Const. Art. III, §§ 2, 4, 5; and Idaho Code § 67-203, as amended, and its predecessors.]

Corollary to this adjudication, the Court is asked to declare the present Idaho Legislature to be illegally constituted and illegitimate, and to enjoin all further election of members of the Legislature under the present system.

Plaintiffs invoke Federal jurisdiction upon the following grounds:

> "The jurisdiction of this Court and the Plaintiffs' right to bring this action are found under the Civil Rights Act, 42 U.S.C. Sec. 1983 and 1988. The Court has additional jurisdiction under 28 U.S.C. Sec. 1343. Relief hereunder is further sought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201 and 2202."

As Mr. Justice Holmes observed for a unanimous Court in *The Fair v. Kohler Die Co.*, 228 U.S. 22 (1913): "Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws or treaties] of the United States . . ." [228 U.S. at 25]. And since *Bell v. Hood*, 327 U.S. 678 (1946)—at least—it appears to have been settled that the mere assertion by a plaintiff of any claim of violation of any provision of the Constitution or laws of the United States is sufficient to invoke the jurisdiction of the Federal courts. Plaintiffs' action then plainly falls within the general "federal-question" jurisdiction of this Court [28 U.S.C.

§ 1331] and, State action being challenged [*cf. Monroe v. Pape*, 365 U.S. 167 (1961)], Federal jurisdiction conferred by 28 U.S.C. § 1343(3) is properly invoked under the Civil Rights Act [see 42 U.S.C. § 1983]. The conclusion is inescapable, therefore, that this Court does have general jurisdiction of the subject matter of plaintiffs' claims. [See *Baker* v. *Carr*, 369 U.S. 186, 198-204 (1962).]

It is well to recall in passing, however, that the Declaratory Judgment Act [28 U.S.C. §§ 2201-2202] does not confer any added jurisdiction upon the Federal courts, but merely enlarges "the range of remedies available" in cases involving subject matter within the scope of Federal jurisdiction elsewhere conferred [*Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)]. Stated more specifically, the Declaratory Judgment Act "merely gave the federal courts competence to make a declaration of rights even though no decree of enforcement be immediately asked. It merely permitted a freer movement of the federal courts within the recognized confines of the scope of equity. The Declaratory Judgment Act 'only provided a new form of procedure for the adjudication of rights in conformity' with 'established equitable principles'." [*Colegrove* v. *Green*, 328 U.S. 549, 551-552 (1946).]

It has been held, moreover, that plainiffs *qua* individuals have standing to sue—to bring this action in this Court. [*Baker* v. *Carr*, *supra*, at 204-208.] As Mr. Justice Brennan declared for the majority of the Court in

Baker: "It would not be necessary to decide whether . . . [plaintiffs'] allegations of impairment of their votes by the . . . [existing] apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it." [369 U.S. at 208.]

Furthermore, it has been held that claims such as plaintiffs here assert do not present a "political question," but tender a justiciable "controversy" within the judicial power conferred by Article III, § 2 of the United States Constitution. [*Gray* v. *Sanders*, 372 U.S. 368 (1963); *Baker* v. *Carr*, *Supra*, 369 U.S. at 208-237, 250, 266.]

Bound by precedent to consider the case at bar as one tendering a justiciable controversy within the subject-matter jurisdiction of this Court and one presented by plaintiffs who have standing to sue, we look once more to *Baker* v. *Carr* for additional guidance, but find that the Court there did not decide what, if any, judicial relief should or could be granted upon the claims there asserted. [See 369 U.S. at 195-198, 237, 241, 265-266.]

Reaching the merits of the case at bar, as *Baker* v. *Carr* requires this Court to do, we confront first plaintiffs' prayer for a declaratory judgment. For more than half a century, Article III of the Idaho Constitution has provided, *inter alia:*

> Sec. 2. *Membership of house and senate.*— The senate shall consist of one member from each county. The legislature may fix the number of

members of the house of representatives at not more than three (3) times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

"Sec. 4. *Apportionment of legislature.*— The members of the first legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegates to congress, and thereafter to be apportioned as may be provided by law: provided each county shall be entitled to one representative.

"Sec. 5. *Senatorial and representative districts.*—A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts."

Section 67-203 of the Idaho Code implements these provisions of the State Constitution.

Plaintiffs assert that the quoted sections of Idaho's Constitution and § 67-203 of the Idaho Code "as applied to the present facts of the State of Idaho and the 1960 census, establishes an arbitrary and capricious apportionment of representatives in the Senate and House without reference to any logical or reasonable formula

whatever, resulting in gross under representation in both houses of the larger urban areas and gross over representation in both houses of the sparsely populated areas," with the result, say plaintiffs, that the challenged provisions of the Idaho Constitution and statutes operate to deny them due process of law and the equal protection of the laws, in defiance of the Fourteenth Amendment to the Federal Constitution.

It is well settled that even where jurisdiction exists to adjudicate a controversy and award relief authorized by the Federal Declaratory Judgment Act, whether to entertain the action and grant relief is a matter within the discretion of the Court. [*Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1933); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 462 (1945); *Coffman* v. *Breeze Corp.*, 323 U.S. 316, 324 (1945).]

We have considered the briefs of counsel, as well as such "evidence" as was adduced upon the "trial" of this cause, and have concluded that the only proper course is for this Court to exercise its discretion against making any declaratory judgment. Several reasons impel us to this conclusion.

First, we lay aside plaintiff's point that Idaho's system of legislative apportionment violates the "due process" clause of the Fourteenth Amendment. The argument in support of this contention completely escapes us and, in our opinion, does not merit discussion.

So we treat with plaintiffs' contention that Idaho's apportionment method defies the mandate of the Fourteenth Amendment's "equal protection" clause. As Mr. Justice Van Devanter wrote for a unanimous Court in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911):

> "The rules by which this contention [violation of equal protection] must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify . . . but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and is therefore purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived which would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." [220 U.S. at 78-79; see also, *Morey* v. *Doud*, 354 U.S. 457, 463-466 (1957).]

Recently the Court has restated these rules by declaring succinctly that a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." [*McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961).] Corollary to this rule, of course, is the principle that a "statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied." [*Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U.S. 405, 415 (1933).]

As we read relevant precedent, there are yet other rules applicable to statutes which, on their face, do not offend the "equal protection" clause of the Fourteenth Amendment. For example, where it must be concluded from all surrounding circumstances that the State Legislature, in enacting the challenged legislation which is constitutionally valid on its face, did so with the legislative intent to work a discrimination [see *McFarland* v. *American Sugar Co.*, 241 U.S. 79, 86-87 (1916); *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79, 112, 114-115 (1901)], or where, regardless of legislative intent, it must be concluded from all surrounding circumstances that the law under attack is applied or enforced with the purpose or intended result of working a discrimination, then such State legislation will be held, in the current phrase coined by Mr. Justice Douglas in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), to result in "invidious discrimination" violating the "equal protection" clause. [See

Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955); *cf.*: *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1885); see also, *Norvell* v. *Illinois*, 375 U. S. 420, 425 (1963); *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963).]

Facing the myriad geographic, demographic, economic, social and political forces that combine to make Idaho the great State it is, we must confess lack of both omnicompetence and prescience, which it appears to us would be necessary, to make a judicial appraisal and declaration that the State's time-old method of apportionment is irrational—beyond the bounds of reasonableness — when measured against what we understand to be the content of the mandate of the "equal protection" clause of the Fourteenth Amendment.

Some of the innumerable imponderables in any scheme of legislative apportionment, if not based upon a mere mathematical formula of "one man-one vote," were catalogued by Mr. Justice Frankfurter upon dissenting in *Baker* v. *Carr*, *supra*, as follows:

> "Apportionment, by its character, is a subject of extraordinary complexity, involving — even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised —considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups,

> communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others." [369 U.S. at 323.]

Neither are we able to declare this a case of "invidious discrimination"; for it would assuredly be nothing more or less than sheer judicial guesswork to say what is invalid without being able at the same time to declare to what extent it is invalid—i.e., what would be a valid system of legislative reapportionment for Idaho.

If the equal protection clause does require the State to adopt a system of legislative apportionment based upon the "one man-one vote" formula [*cf.: Gray* v. *Sanders, supra*, 372 U.S. 368; *MacDougall* v. *Green*, 335 U.S. 281 (1948)], requires in other words the nearest practicable relationship between population and legislative representation—then the standard is a purely mathematical one; and it seems unnecessary to observe that there is seldom rational excuse for departing more than *de minimis* from any standard of mathematical exactness.

If, *per contra*, the relationship between legislative representation and population involves other than a mathematical standard, then we are without precedent or wisdom to declare how inexact it can constitutionally be.

Simply to declare the present apportionment system invalid, as plaintiffs urge us to do, thereby leaving the State presumably with no *de jure* legislature, and no system of selecting one, might well effect a temporary denial to Idaho of "a Republican Form of Government," in violation of the express guarantee of Article IV, § 4 of the United States Constitution. [See Idaho Admission Bill, Preamble, 26 Stat. 214 (1890); *cf.: Taylor & Marshall* v. *Beckham* (No. 1), 178 U.S. 548, 579-580 (1900); *In re Duncan*, 139 U.S. 449, 461-462 (1891); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 175-176 (1874); see also, *Baker* v. *Carr*, *supra*, 369 U.S. at 222-223, n. 48.] Whether or not that would be the result is a "political question," which long-established precedent forbids this Court to decide [see: *Ohio ex rel. Bryant* v. *Akron, etc. District*, 281 U.S. 74 (1930); *Marshall* v. *Dye*, 231 U.S. 250, 256-257 (1913); *Pacific States Telephone Co.* v. *Oregon*, 223 U.S. 118, 149-151 (1912); *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849)], just as the courts are indeed forbidden by judicial precedent to decide whether the Fourteenth Amendment was ever ratified in the manner required by the Constitution [see: *Coleman* v. *Miller*, 307 U.S. 433, 448-449 (1939); *Leser* v. *Garnett*, 258 U.S. 130 (1922); *Harwood* v. *Wentworth*, 162 U.S. 547 (1896), *Field* v. *Clark*, 143 U.S. 649 (1892); *cf. Baker* v. *Carr*, *supra*, 369 U.S. at 214-215; see, also: Lawrence, *Undoing a Fraud*, U.S. News & World Report, Aug. 12, 1963, pp. 82-83; *Does the Fourteenth Amendment Incorporate the Bill of Rights?*

—Fairman, *The Original Understanding*, and Morrison, *The Judicial Interpretation*, 2 Stanford L. Rev. 5, 140 (1949)].

Since the commencement of this action, the Idaho Legislature in 1963 reapportioned itself on the basis of the 1960 Census. This reapportionment followed a decision of the Idaho Supreme Court in a State-court reapportionment suit. [See *Caesar* v. *Williams*, 84 Idaho 254, 371 P. 2d 241 (1962).]

In *Caesar* v. *Williams*, *supra*, plaintiff asked the Idaho court, in light of the 1960 Federal Census, to declare that the Idaho apportionment statute [Idaho Code § 67-203], then last amended in 1951, violated the "equal protection" clause of the Idaho Constitution, which provides:

> "*Political power inherent in the people.*—All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature." [Idaho Constitution, Art. I, § 2.]

The Idaho Supreme Court deferred decision on the validity under Idaho's Constitution of her then effective legislative apportionment statute, saying:

> "Until such time as the legislature has had ample opportunity to fully examine the impact of the 1960 Census on the apportionment of representatives throughout this State, in the light of Idaho Const. Art. III, §§ 2, 4, and 5, we cannot say that the 1951 Act is unconstitutional as having failed to grant representative rights of the citizenry of this State afforded by the Constitution." [371 P. 2d at 249.]

We infer that the recent 1963 apportionment statute, under attack at bar [Idaho Code § 67-203, as amended by 1963 Idaho Sess. Laws, ch. 15, at 149], was enacted in response to the above-quoted suggestion of Idaho's Supreme Court. And, interestingly enough, it was conceded by counsel at the bar upon oral argument here that, since the passage of the 1963 statute, no Idaho citizen has as yet seen fit to return to the Idaho Supreme Court to seek a determination as to the constitutionality of the new legislative apportionment statute under Idaho's Constitution.

Recalling the oft-repeated admonition that this Court should refrain from declarations as to Federal constitutional questions whenever permissible [see: *Staub* v. *City of Baxley*, 355 U.S. 313, 330 (1958); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74-75 (1955); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569, 576-577, 584 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288,

341 (1936)], the circumstances that every claim asserted by plaintiffs in the case at bar can be adequately tested and adjudicated in a State court suit, points to the wisdom of our decision that this Court should decline to interfere in the State process unless and until forced to do so [see *Brillhart* v. *Excess. Ins. Co.*, 316 U.S. 491 (1942); *cf.: Matthews* v. *Handley*, 361 U.S. 127 (1959), *affirming* 179 F. Supp. 470 (N.D. Ind. 1959); *Remmey* v. *Smith*, 342 U.S. 916 (1952), *affirming* 102 F. Supp. 708 (E.D. Pa. 1951); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); see also, *McNeese* v. *Board of Education*, 373 U.S. 668, 673 (1963)].

The considerations stated, then, prompt us to hold that, even though this Court does have jurisdiction over the subject matter of plaintiffs' claim at bar for declaratory relief, the action should be dismissed as to that claim, solely upon the ground that, in the proper "exercise of the Court's discretion, relief by way of declaratory judgment should be denied, without consideration of the merits." [See: *Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*, 319 U.S. 293, 301-302 (1943); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 272-273 (1941).]

Turning now to plaintiffs' claim for equitable relief, it is well to recall at the outset that "the general powers of Federal courts when sitting as courts of equity . . . can be exerted only in cases otherwise within the jurisdiction of those courts as defined by Congress." [*Briggs*

v. *United Shoe Machinery Co.*, 239 U.S. 48, 50 (1915); *Rees* v. *Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873).] Also that the equity jurisdiction of the Federal District Courts, and of their predecessor circuit courts, as it has existed since conferred by § 11 of the Judiciary Act of 1789 [1 Stat. 78], has never been held to exceed in scope that which the High Court of Chancery in England possessed in 1789 [*Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939); *Mississippi Mills* v. *Cohn*, 150 U.S. 202, 205 (1893); *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 460 (1855)].

As the Court explained in *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, *supra*:

> "The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." [306 U.S. at 568.]

This is why Federal courts of equity have always eschewed jurisdiction of the probate of wills and administration of estates [*Markham* v. *Allen*, 326 U.S. 490, 494 (1946); *Gaines* v. *Chew*, 43 U.S. (2 How.) 619, 645 (1844)], of divorce matters [*Barber* v. *Barber*, 62 U.S. (21 How.) 582, 584; *cf. Ohio ex rel. Popo-*

vic v. *Agler*, 280 U.S. 379, 383 (1930)], of cases involving the enforcement of charitable bequests [*Fontain* v. *Ravenal*, 58 U.S. (17 How.) 369, 392-393 (1855)], and of determination as to custody [*cf. Barry* v. *Mercein*, 46 U.S. (5 How.) 103, 119-120 (1847)] and support [*cf. Albanese* v. *Richter*, 161 F. 2d 688, 689 (1947), *cert. denied*, 332 U.S. 782 (1947)].

It seems no overstatement to say that, in 1789, the High Court of Chancery would have been greatly shocked at the suggestion that equity might afford injunctive relief under the facts at bar. [See: *Giles* v. *Harris*, 189 U.S. 475, 486 (1903); *In re Sawyer*, 124 U.S. 200, 221 (1888); *Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50 (1867); *cf.*: *Attorney General* v. *Earl of Clarendon*, 17 Ves. Jr. 491, 498, 34 Eng. Rep. 190, 193 (Ch. 1810); *Nabob of the Carnatic* v. *East India Company*, 1 Ves. Jr. 371, 393, 30 Eng. Rep. 391, 402 (Ch. 1791); *Penn* v. *Lord Baltimore*, 1 Ves. 444, 446-447, 27 Eng. Rep. 1132, 1133 (Ch. 1750); and see Pound, *Cases on Equitable Protection of Personality and of Social and Political Relations*, ch. IV c, 31-74 (1915), reprinted in Chafee & Pound, *Cases on Equitable Relief Against Torts* (1933).]

Where Federal equity jurisdiction is invoked, therefore, it is the duty of the Court to determine at the outset "whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity." [*Atlas Life Ins. Co.* v.

W. I. Southern, Inc., supra, 306 U.S. at 570; see: *Alabama Public Service Comm.* v. *Southern Ry.*, 341 U.S. 341, 345 (1951); *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 234-235 (1943); *Di Giovanni* v. *Camden Fire Ins. Ass'n.*, 296 U.S. 64, 691 (1955); *Twist* v. *Prairie Oil Co.*, 274 U.S. 684, 690-691 (1927); *Massachusetts State Grange* v. *Benton*, 272 U.S. 525, 528 (1926); *Reynes* v. *Dumont*, 130 U.S. 354, 395 (1889); *Payne* v. *Hook, supra*, 74 U.S. (7 Wall.) at 430.]

If the case does not warrant exercise of the court's equitable powers, this fact, "if obvious, may and should be objected to by the court of its own motion." [*Matthews* v. *Rodgers*, 284 U.S. 521, 524 (1932); *Singer Sewing Machine Co. of New Jersey* v. *Benedict*, 229 U.S. 481, 484 (1913); *Lewis* v. *Cocks*, 90 U.S. (23 Wall.) 466, 470 (1874).]

Plaintiffs ask us to prohibit by injunction the holding of any further elections for members of the Idaho Legislature until a system of legislative apportionment is adopted which will assure plaintiffs "equal protection of the laws"—i.e., what they conceive to be their proportionate share of political influence.

We were admonished long ago that: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issue of an injunction." [*Truly* v. *Wanzer*, 46 U.S. (5 How.) 140, 142 (1847).]

In *South* v. *Peters*, 339 U.S. 276 (1950), the Court declared that: "Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." [339 U.S. at 277; *cf. Gray* v. *Sanders*, *supra*, 372 U.S. at 373, 381, 383.]

Centuries old is the rule that: "A court of equity ought to do justice completely, and not by halves." [*Camp* v. *Boyd*, 229 U.S. 530, 551 (1913).] As was observed in treating with plaintiffs' prayer for a declaratory judgment, this Court lacks the wisdom and perspicacity to adjudge either that Idaho's present legislative apportionment plan is beyond the bounds of reasonableness, or even what would be a more rational plan, all factors considered; and more especially so in view of the declaration in *MacDougall* v. *Green*, 335 U.S. 281 (1948), that:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the

States." [335 U.S. at 284; and see: *Colegrove* v. *Green*, 328 U.S. 549 (1946); *Wood* v. *Broom*, 287 U.S. 1, 8 (1932); *Walton v. House of Representatives*, 265 U.S. 487, 490 (1924).]

Our inability, for reasons already stated, "to do justice completely, and not by halves" in this case is emphasized by what Mr. Justice Douglas so pointedly wrote for the Court in *A. F. of L.* v. *Watson*, 327 U.S. 582 (1946):

> "Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent . . .'" [327 U.S. at 593.]

There is nothing in the record here which even tends to persuade us that any claimed injury to plaintiffs is "irreparable" or "clear" or "imminent."

To borrow from Mr. Justice Rutledge's concurring opinion in *MacDougall* v. *Green*, *supra*:

> "Even if we assume that . . . [plaintiffs'] constitutional rights have been violated, the questions arise whether, in those circumstances, the equity arm of the federal courts can now be extended to give effective relief; and whether the relief, if given, might do more harm than good, might not indeed disrupt the . . . [next Idaho] election alto-

> gether or disenfranchise more persons than have been disenfranchised by the application of the questioned . . . [Idaho] procedures." [335 U.S. at 285-286.]

In the same case, Mr. Justice Douglas declared upon dissenting that:

> "The equity court, moreover, must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing." [Id., at 290.]

Almost since "time knoweth not to the contrary," it has been a settled maxim of equity jurisprudence that a court of equity will not issue an unenforceable decree of injunction, mandatory or prohibitory. As Mr. Justice Holmes put it with characteristic conciseness three generations ago: "In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make." [*Giles* v. *Harris*, *supra*, 189 U.S. at 487; see also *Mills* v. *Green*, 159 U.S. 651 (1895).]

In the view of one observer, "it taxes the imagination to conjure a vision of the marshals breathing down the necks of the members of the [Idaho Legislature] . . . while they parrot the requisite number of 'ayes,' or the prosecution for contempt of legislators who voted 'nay' on the district court's apportionment bill." Lucas, *Of Ducks and Drakes: Judicial Relief in Re-apportionment Cases*, 38 Notre Dame Law. 401, 409 (1963).

This calls to mind the fact that the members of the Idaho Legislature have not even been made parties to this action. Plaintiffs nonetheless urge that, if this Court will only grant the decree they seek, our orders will not require enforcement; that they will enforce themselves, so to speak. Plaintiffs' hope of course is that, if this Court will only declare the present system of legislative apportionment void under the equal protection clause of the Fourteenth Amendment, then the present Idaho Legislature—at that time *ex necessitate* only a *de facto* body by virtue of our declaration—would presumably "do something about it," and at least remove in part what plaintiffs say are the intolerable defects of the present. Thus plaintiffs in effect argue that this Court should attempt to "bluff" or "spur" the Idaho Legislature into action; that we should issue a "left-handed" injunction whereby the Court would attempt to accomplish indirectly what it could not possibly bring about directly. [See Chafee, *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1019 (1929).]

Manifestly, this Court cannot control the State-law effects of any decree it might enter. So we are powerless, ourselves, to establish a particular legislature as the proper governing body of the State of Idaho. But that is not all. As stated earlier, were we to grant the relief plaintiffs ask and thereby deprive Idaho of a *de jure* Legislature, surely we would at the same time probably deprive the people of Idaho, at least tempor-

arily, of "a Republican Form of Government" guaranteed to them by Article IV, § 4, of the Federal Constitution. Thus, while attempting to vindicate what plaintiffs conceive to be their rights under the "equal protection" clause of the Fourteenth Amendment, this Court might work a violation by the Federal Government of the "guarantee clause" of Article IV, § 4.

We should not willingly so stultify ourselves, or so prostitute the power and process of this Court. Beyond the age-old policy against advisory opinions, and *a fortiori* advisory judgments [see *Muskrat* v. *United States*, 219 U.S. 346, 361-362 (1911); *cf.* Letter from Chief Justice Jay to Secretary of State Jefferson, August 8, 1793, in Hart & Wechsler, *The Federal Courts and The Federal System* 77 (1953)], we would echo the warning of Mr. Justice Frankfurter that "there is nothing judicially more unseemly nor more self-defeating than for . . . [a] Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope." [*Baker* v. *Carr*, *supra*, 369 U.S. at 270.]

Since plaintiffs have failed, for the reasons discussed, to state a claim for which this Court can grant equitable relief [see: *Matthews* v. *Rodgers*, *supra*, 284 U.S. at 524-525; *Twist* v. *Prairie Oil & Gas Co.*, *supra*, 274 U.S. at 689-691; see also *Colegrove* v. *Green*, *supra*, 328 U.S. at 565, n. 2], "and the defect in the bill is incapable of remedy by amendment, its dismissal should

be directed" [*Myers* v. *Bethlehem Steel Co.*, 303 U.S. 41, 52-53 (1938); *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U.S. 485, 494-495 (1900)].

The foregoing shall constitute findings of fact and conclusions of law, as required by Fed.R.Civ.P. 52(a), and the Clerk will enter judgment [*id.* 58(1)] dismissing the action without costs to any party: (1) as to the claim for declaratory relief, solely upon the ground that, in the proper exercise of the Court's discretion, relief by way of declaratory judgment should be denied, without consideration of the merits [*Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*, 319 U.S. at 301-302; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, *supra*, 312 U.S. at 272-273; and see *Colegrove* v. *Green*, *supra*, 328 U.S. at 551-552]; and (2), as to the claim for injunctive relief, upon the ground of "want of equity"—that is, failure to allege or prove a claim for which effective equitable relief can be granted. [*Matthews* v. *Handley*, *supra*, 361 U.S. 127; *Radford* v. *Gary*, 352 U.S. 991 (1957); *Remmey* v. *Smith*, *supra*, 342 U.S. 916.]

KOELSCH, *Circuit Judge* (dissenting)

The Court declines to meet the basic issue in this case because of a professed lack of ability to comprehend and appraise the many and complex factors that may or do enter into the problem of the equitable representation of voters in the Legislature of the State of Idaho. Additionally the court does not entertain the

petition because no method for correcting the asserted injustice is apparent.

Neither of these reasons, in my estimation, justifies a judicial disposition that does not come to grips with a problem touching such a fundamental right as that of legislative representation. I believe here it is particularly true that ". . . we act in these matters not by authority of our competence but by force of our commissions." Jackson, J. in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 640 (1943). More importantly, lessons learned in other cases indicate that the difficulty of a task does not *per se* put the task beyond the institutional competence of the judiciary. See Douglas, J., concurring in *Baker* v. *Carr*, 369 U.S. 186, 245-250 (1962) and Clark, J., concurring *Id.* at 259,-262. See also comment *Baker* v. *Carr and Legislative Apportionments: A Problem of Standards*, 72 Yale L.J. 968, (1963).

In *Baker* v. *Carr*, the Supreme Court went far toward answering the position of the majority: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." 369 U.S. at 226.

I therefore dissent.

M. OLIVER KOELSCH,
United States Circuit Judge.

APPENDIX B

UNITED STATES CONSTITUTION, FEDERAL STATUTES AND STATE CONSTITUTIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION:

Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.***

FEDERAL STATUTES:

U.S.C., Title 42, Sections 1983 and 1988:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

U.S.C., Title 28, Section 1343, (3):

§ 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:***

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by

the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

The Federal Declaratory Judgment Act
U.S.C., Title 28, Sections 2201 and 2202:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

THE CONSTITUTION OF THE STATE OF IDAHO

ARTICLE III—LEGISLATIVE DEPARTMENT

§ 1. Legislative power—Enacting clause—Referendum—Initiative.—The legislative power of the state shall be vested in a senate and house of representatives.

The enacting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."

The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted.

§ 2. Membership of house and senate.—The senate shall consist of one (1) member from each county. The legislature may fix the number of members of the house of representatives at not more than three (3) times as many representatives as there are senators. The sena-

tors and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

As originally adopted, Article III, Section 2 of the Constitution of the State of Idaho provided as follows:

§ 2. The senate shall consist of eighteen members and the house of representatives of thirty-six members. The legislature may increase the number of senators and representatives: provided, the number of senators shall never exceed twenty-four, and the house of representatives shall never exceed sixty members. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may from time to time be divided by law.

House Joint Resolution No. 13, proposing the 1911 amendment to the Idaho Constitution provided as follows:

SECTION 1. That Section 2 of Article III of the Constitution of the State of Idaho be amended to read as follows:

'Sec. 2. The Senate shall consist of one member from each county of the state now created or hereafter to be created and the House of Representatives shall consist of not to exceed three times the number of Senators. The Senators shall be chosen by the electors of the respective counties and the Representatives shall be chosen

by electors of the respective counties or districts into which the state may from time to time be divided by law.'

"SECTION 2. The question to be submitted to the electors of the State of Idaho at the next general election shall be as follows, to-wit:

" 'Shall Section 2 of Article III of the Constitution of the State of Idaho, be amended so as to provide that the Senate shall consist of one member from each of the counties of the state now created or which may hereafter be created, and the House of Representatives consist of not to exceed three times the number of Senators?'

§ 4. Apportionment of legislature.—The members of the first legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to congress, and thereafter to be apportioned as may be provided by law: provided, each county shall be entitled to one representative.

§ 5. Senatorial and representative districts.—A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts.

ARTICLE XX—AMENDMENTS

§ 1. How amendments may be proposed. — Any amendment or amendments to this Constitution may

be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each county; and if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

§ 3. Revision or amendment by convention. — Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members, not less than double the number of the most numerous branch of the legislature.

§ 4. Submission of revised constitution to people. —Any Constitution adopted by such convention, shall have no validity until it has been submitted to, and adopted by, the people.

STATE STATUTES: IDAHO CODE SECTION 34-1801:

34-1801. Petition. — The following shall be substantially the form of petition for any law proposed by the initiative:

WARNING

It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a legal voter.

INITIATIVE PETITION

To the Honorable , Secretary of State of the State of Idaho: We, the undersigned citizens and legal voters of the State of Idaho, respectfully demand that the following proposed law, to-wit: (setting out full text of measure proposed) shall be submitted to the legal voters of the State of Idaho, for their approval or rejection at the regular general election, to be held on the day of , A.D., 19 , and each for himself says: I have personally signed this petition; I am a legal voter of the State of Idaho; my residence and postoffice are correctly written after my name.

Name Residence. Postoffice.

(If in a city, street and number.)

(Here follow twenty numbered lines for signatures.)

The petition for referendum on any act passed by the state legislature of the state of Idaho shall be substantially the same form with appropriate title and changes, setting out in full the text of the act of the legislature to be referred to the people for their approval or rejection.

SECTION 67-202:

67-202. Senatorial districts.—Each county in the state now existing or hereafter created shall constitute a senatorial district and shall elect one senator.

SECTION 67-203 AS PRESENTLY ENACTED:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one (1) representative for the first five thousand (5,000) population and one (1) additional representative for each additional ten thousand (10,000) population of such county. Population for this purpose shall be determined solely according to the last official United States census; provided that there shall be at least one (1) representative from each county.

SECTION 67-203 AS ENACTED IN 1951:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each * *seventeen* thousand * * population of such county and remaining fraction thereof amount-

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ing to * three thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census; provided that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1941:

67-203. Representative districts. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each twelve thousand five hundred population of such county and remaining fraction thereof amounting to five thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census; provided that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1933:

REPRESENTATIVE DISTRICTS. — The several counties shall elect members of the house of representatives as follows: Each county shall elect one representative for each * * * *ten thousand population of such county* and remaining fraction thereof amounting to * * * *five thousand population or more. Population for this purpose shall be determined solely according to the last official United States Census;* provided, that there shall be at least one representative from each county.

SECTION 67-203 AS ENACTED IN 1917:

The apportionment of the houses of the Legislature is and shall be as follows:

Each county in the State of Idaho and any county which may hereafter be created shall constitute a senatorial district and shall elect one senator.

The several counties shall elect members of the House of Representatives as follows: Each county shall elect one representative for each 2,500 votes and remaining fraction thereof amounting to 1,000 votes or more cast in said county at the last general election, based on the total vote cast for all candidates for Governor: *Provided*, That there shall be at least one representative from each county. It shall be the duty of the Secretary of State to certify to the county auditor of each county on or before the first day of April, 1918, and biennially thereafter the number of representatives in the Legislature said county will be entitled to elect at the following election. When any new counties have been created, subsequent to the last general election for Governor, the total vote cast for Governor in the territory included in any such new county and in the territory remaining in any county or counties from which said new county or counties have been created shall be estimated by the Secretary of State as nearly as possible from the election returns and the legislative apportionment figured thereon.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1075

WALTER R. HEARNE AND STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Appellees.

On appeal from the United States District Court for Idaho, Southern Division

MOTION TO DISMISS OR AFFIRM

ALLAN G. SHEPARD
Attorney General of the State of Idaho

M. ALLYN DINGEL, JR.
Assistant Attorney General of the State of Idaho

Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

227 State House
Boise, Idaho

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams and Marjorie R. Moon pursuant to Rule 16 of the Rules of the Supreme Court of the United States move that the appeal be dismissed or, in the alternative, that the judgment of the court below dismissing the complaint attacking the apportionment of the membership of the Idaho legislature be affirmed.

ARGUMENT

I.

This case is unusual insofar as considerations entering into apportionment of the Idaho Legislature are concerned. Subsequent to the commencement of this litigation the Idaho Legislature in 1963 reapportioned itself on the basis of the 1960 Census. As noted by the lower court in the instant matter (225 F. Supp. at pages 651-52), this legislative action followed a decision of the Idaho Supreme Court in the reapportionment suit of *Caesar v. Williams*, 84 Idaho 254, 371 P. 2d. 241 (1962). The history of the Idaho Legislature reveals that this elected body has recognized its responsibilities toward reapportionment. The Legislature has periodically reapportioned itself, doing so in 1917, 1933, 1941, 1951, and again in 1963. Yet, appellants' second cause of action claims these various statutes, ". . . constituted over the period a continuing systematic device to perpetuate majority control of both legislative houses by a minority of residents in Idaho . . ." (Appellants' jurisdictional brief, page 8.) Again, on page 16 of their brief, appellants state that, ". . . the malapportionment itself is, and is intended to be, self-perpetuating unless judicial relief is available." Appellants base this contention on their supposition that, ". . . no solution to this problem can be expected from voluntary action of the Legislature which is itself, a product of the malapportionment." (Appellants' jurisdictional brief, pages 14-15.)

The actions of the Idaho Legislature in 1963 vividly demonstrate that appellants' accusations belittling the

integrity of the Idaho lawmakers are false. House Bill No. 50, which reapportioned the House of Representatives in 1963 thereby giving larger populated counties additional representation, was passed by the House with 57 ayes, 2 nays, and 4 excused. The bill passed the Senate with 39 ayes, 2 nays, and 3 excused. This overwhelming vote displays a great wealth of bi-partisanship that tarnishes, if not totally destroys, any such contention of appellants. These appellants believe the Supreme Court of the United States will agree that the Idaho Legislature has not abdicated its political responsibility. The inference found in the following remarks of the lower court in 225 F. Supp. at page 652, emphasize these appellees' position:

> "We infer that the recent 1963 apportionment statute, under attack at bar [Idaho Code § 67-203, as amended by 1963 Idaho Sess. Laws, ch. 15, at 149], was enacted in response to the above-quoted suggestion of Idaho's Supreme Court. And, *interestingly enough*, it was conceded by counsel at the bar upon oral argument here that, since the passage of the 1963 statute, *no Idaho citizen has as yet seen fit to return to the Idaho Supreme Court to seek a determination as to the constitutionality* of the new legislative apportionment statute under Idaho's Constitution." (Emphasis added.)

II.

The lower court easily disposed of appellants' contention that the legislative apportionment violated the due process clause of the Fourteenth Amendment. "The argument in support of this contention complete-

ly escapes us and, in our opinion does not merit discussion." 225 F. Supp. at page 650.

Appellants took up the bulk of the one day trial with attempts to place into evidence, materials offered to prove that the apportionment formulas violated the due process clause. Appellants' third cause of action alleged this violation and it is stated as Number 6 in their "Questions Presented" before this Court. These appellees submit that the decision in *Baker v. Carr*, 369 U. S. 186, 82 S. ct. 691, 7 L.ed. 2d. 663, did not go any further than to uphold the jurisdiction of the Federal Courts as to reapportionment cases alleging deprivation of the constitutional right of equal protection under the Fourteenth Amendment.

Furthermore, as Mr. Justice Frankfurter pointed out in *Gomillion v. Lightfoot*, 364 U. S. 339, 343, 81 S. ct. 125, 128, 5 L.ed. 110, 114 (1960):

> ". . . if one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers."

In the 1963 decision of *Lisco v. Love*, 219 F. Supp. 922 (D. Colo.), which has been recently argued before this Court, the three judge panel made the following observation:

> "For all practical purposes the Supreme Court has foregone the application of the Due Process Clause in substantive matters unless an impinge-

ment on some absolute civil right occurs. Although the right of franchise is 'a fundamental political right, because preservative of all rights,' no provision of the Federal Constitution of which we are aware makes it an absolute right or forbids apportionment of a state legislature on a basis other than one-man one-vote. *Baker v. Carr* speaks in terms of 'rationality' and 'invidious discrimination.' The use of these terms precludes the existence of an absolute right." 219 F. Supp. at page 926.

III.

Appellants' first "Question Presented" is whether the District Court could refuse to make a decision on the merits in exercising its jurisdiction under the Declaratory Judgment Act. On page 13 of their brief appellants state this case poses for the first time whether a lower court in exercising its discretion could *avoid* a decision on the merits. But these appellees submit appellants have overlooked the following statement of the District Court:

> "We have considered the briefs of counsel, as well as such 'evidence' as was adduced upon the 'trial' of this cause, and have concluded that the only proper course is for this Court to exercise its discretion against making any declaratory judgment. Several reasons impel us to this conclusion." 225 F. Supp. at page 649.

These appellees cannot improve upon the clarity of the District Court's language in enunciating the numerous reasons, and in the interest of brevity appellees will not elaborate to any great extent on the cogent opinion of the court below.

IV.

One who directs a frontal attack upon the constitutionality of a law through the use of the equal protection clause of the Fourteenth Amendment must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Mr. Justice Stewart's concurring opinion in *Baker v. Carr*, 369 U. S. 186, 266, 82 S. ct. 691, 737, 7 L.ed. 2d. 663, 714 (1962) discusses this burden:

> "In *MacDougall v Green*, 335 U S 281, 93 L ed 3, 69, S Ct 1, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' 335 U S, at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' *McGowan v. Maryland*, 336 U S 420, 425, 6 L ed 2d 393, 399, 81 S Ct 1101. *In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' Metropolitan Casualty Ins. Co. v. Brownell*, 294 U S 580, 584, 79 L ed 1070, 1072, 55 S Ct 538." (Emphasis added.)

The only evidence adduced at the trial by appellants was the raw population statistics of Idaho's forty-four counties. These appellees believe the holding in *Baker v. Carr* does not stand for the proposition that such cold statistics alone are sufficient to carry the burden.

The statistics themselves do not demonstrate that the legislature's actions have resulted in "invidious discrimination" violating the equal protection clause. The District Court at pages 654-55 adopted the pointed language of Mr. Justice Douglas in *A. F. of L. vs. Watson*, 327 U. S. 582, 593, 66 S. ct. 761, 766, 90 L.ed. 873, 880, (1946), in stating a federal court of equity should interfere with the enforcement of state laws only "to prevent irreparable injury which is clear and imminent." Continuing, on page 645 the District Court said:

> "There is *nothing in the record* here which even tends to persuade us that any claimed injury to plaintiffs is 'irreparable' or 'clear' or 'imminent'." (Emphasis added.)

Thus, the court dismissed the claim for injunctive relief upon the ground of the appellants' failure to allege or prove a claim for which effective relief could be granted.

CONCLUSION

These appellees submit that appellants sole contention is that any deviation in population violates the Fourteenth Amendment. Appellants instituted this suit in the wake of *Baker v. Carr* and thus carry the onus of sustaining the burden of proof at the trial of this matter. The only relevent evidence adduced at the trial in the instant matter pertained solely to population statistics. These appellees believe that the State of Idaho's geographical divisions such as mountain ranges, river basins, accessibilities, homogeneity, and

problems of transportation and communication do not lend themselves to the solution that appellants attempted to obtain in their one day trial.

These appellees respectively ask this Court to dismiss the appeal or in the alternative to affirm the District Court's judgment.

Respectfully submitted

ALLAN G. SHEPARD,
Attorney General,
State of Idaho

M. ALLYN DINGEL, JR.,
Assistant Attorney General
State of Idaho

Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

PROOF OF SERVICE

I, Allan G. Shepard, Attorney General of the State of Idaho, and one of the Attorneys for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of June 1964, I served copies of the foregoing Motion to Dismiss or Affirm on the several parties thereto by mailing copies

in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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